UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

AMERICOLD LOGISTICS, LLC,

Employer,

and Case No. 25-RD-108194

KAREN COX,

Petitioner,

and

RETAIL, WHOLESALE AND
DEPARTMENT STORE UNION, UFCW,
LOCAL 578

Intervenor.

PETITIONER'S OPPOSITION TO THE INTERVENOR'S REQUEST FOR REVIEW

On June 18, 2012, Americold Logistics (the "Employer") voluntarily recognized the Retail, Wholesale, and Department Store Union, UFCW, Local 578 (the "Union"). Over one-year later, on June 27, 2013, Ms. Karen Cox filed a petition for a decertification election. The Regional Director ordered an election, as more than one year had passed and no contract had been entered into since recognition. Ms. Cox files this opposition to the Union's request for review and in support of her election. The Regional Director was correct in upholding the National Labor Relations Act's ("NLRA" or "Act") overarching preference for employee free choice and ordering an election, because a voluntary recognition bar, absent any unfair labor practices, cannot last longer than one year.

INTRODUCTION AND STATEMENT OF THE ISSUE

Congress has granted unions that go through the crucible of a secret-ballot election a single calendar year to shield themselves from a representation challenge. *See* Section 9(c)(3), of

the NLRA, 29 U.S.C § 159(c)(3). In this case, the Union seeks a voluntary recognition bar extending well beyond the congressionally-created certification bar. This is a baseless claim, given the express statutory language in Section 9(c)(3). The Board's voluntary recognition bar cannot last *longer* than the congressionally-created certification bar, where there have been no unfair labor practices by the employer.

In *Lamons Gasket Co*., 357 NLRB No. 72 (Aug. 26, 2011), the Board overturned *Dana Corp*., 351 NLRB 434 (2007), which had allowed employees to immediately petition for decertification after an employer's voluntary recognition of a union. In so doing, the Board held that employees could still exercise their free choice to challenge union representation after a voluntary recognition, but only after the union was given a reasonable time to bargain. *Lamons Gasket*, at slip op. 14. Here, the Union seeks to block an election by claiming the voluntary recognition bar can exist after one year has passed. The Union latches on to an alleged ambiguity in *Lamons Gasket* where the Board said, "we define a reasonable period of bargaining, during which the recognition bar will apply, to be no less than 6 months after the parties' first bargaining session and no more than one year." *Id*. Contrary to the Union's argument, there is no ambiguity here, as the Act compels the Board to construe "no more than one year" to mean one calendar year from the date of the voluntary recognition. Otherwise, the voluntary recognition bar will provide a *greater* shield to a representation challenge than Congress' statutorily-enacted certification bar. The Union's position is meritless given the Board's own preference for secret ballot elections and its oft-stated understanding that voluntary recognitions are *not* entitled to the same level of Board protection as secret ballot elections. *Levitz Furniture Co*., 333 NLRB 717, 723 (2001) ("we emphasize that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions.").

Indeed, the Union's position cannot be valid, since *Lamons Gasket* is clear: certification after an election carries more attendant legal advantages than mere voluntary recognition, including a stronger election bar. *Lamons Gasket* specifically recognizes that an election is the only way for a union to have a "12-month bar to election petitions under Section 9(c)(3)." 357 NLRB at slip op. 14 n.35. The *Lamons Gasket* Board unambiguously declared its decision would not equate "the processes of voluntary recognition and certification following a Board-supervised election." *Id*. at slip op. 14. As a voluntary recognition cannot provide greater protection than the congressionally-created certification bar, the Board must either deny the Union's request for review, or summarily affirm the Regional Director's direction of election.

STATEMENT OF FACTS

The bargaining unit consists of two related facilities, one half mile apart, in Rochelle, Illinois. Each facility engages in the warehousing and distribution of refrigerated and non-refrigerated products. At the time this petition was filed, the bargaining unit was comprised of 110 employees.

On May 22, 2012, the Union petitioned the NLRB for a secret-ballot election, seeking to win the advantages of the certification bar.[1] However, on June 7, 2012, the Employer and Union held a "card count" to determine if the Union represented a majority of employees and the Union withdrew its petition to the NLRB. Thereafter, the parties executed a voluntary recognition agreement on June 15 and June 18, 2012.

At this juncture an obligation attached to the Employer to bargain and normally the parties would begin negotiations. However, post-recognition, the Union delayed bargaining for nearly four months. First, the Union attempted to elect stewards and a bargaining committee, but due to poor organization and communication, and despite having access to employee addresses,

[1] *See Americold Logistics, Inc*., 25-RC-081531.

bulletin boards in the workplace, and member information from authorization cards, it took the Union two separate meetings to elect its officers. Tr. 40:15-21; 41:14-19.[2] The Union held a number of meetings to determine its bargaining positions, further contributing to the delay. The Union held four to six meetings with employees over a four month period following the voluntary recognition. Tr. 42:11-13; 106:6-8. Tr. 106:9-25. These "planning" meetings could have taken place within days after recognition, but they did not, as the Union willfully dragged its feet before coming to the negotiating table. Given the size of the bargaining unit, and the Union's familiarity with the bargaining process, it could have accomplished this pre-negotiation planning in less time than four months.

Adding to this delay, the Union took until July 30, 2012, more than seven weeks post-recognition, to request information in preparation for contract negotiations. The Employer provided a timely response to this request on August 16, 2012, however the Union did not feel ready to go to the bargaining table until "mid-September." Tr. 48:9-10. As the record demonstrates, the Employer never refused to meet with the Union prior to October 9, 2012. Tr. 99:2-5; 157:21-23.[3]

Between October 9, 2012 and June 26, 2013, the parties held twenty-two bargaining sessions. By March 2013, they had agreed on almost all of the non-economic terms of the contract and had started negotiations on the economic terms. Eventually, the parties reached a

[2] Cites herein are to the April (Tr. x:x) and July (Tr.2. x:x) transcript from the hearings conducted on Ms. Cox's petitions.

[3] The Union's Request for Review takes great pains to paint a picture of a recalcitrant Employer. Full consideration of the record shows the Union was primarily responsible for the longest delay in bargaining (from June to October, 2012), and no meetings were scheduled in December 2012 due to *mutual* unavailability. Tr. 48:20-22; 61:7; 102:25-103:2; 151:1-4. Moreover, given the number of bargaining sessions, the time devoted to bargaining, and the fact a contract was agreed to, it is difficult to understand how the Union could paint the Employer as averse to bargaining. To follow the progress of bargaining between the parties, one need only to refer to the Request for Review in *Americold Logistics*, 25-RD-102210. Regardless, as the Regional Director's decision correctly shows, the process of bargaining is irrelevant here, because more than one year has passed. As more than one year has passed no election bar can exist. Therefore, the reasonable time-to-bargain test elucidated in *Lee Lumber & Building Material Corp*., 334 NLRB 399 (2001) is irrelevant to whether the petitioner should have an election.

tentative agreement on June 26, 2013, which required Union ratification. The Union ratified the contract on June 29, 2013.

ARGUMENT

I. The Regional Director's Decision to Order an Election Was Correct Because More Than One Year Has Passed Since Voluntary Recognition and There Have Been No Employer Unfair Labor Practices.

Here, the Union has been voluntarily recognized for more than one year. As more than one year has passed since recognition, and without any unfair labor practices being found to motivate employee dissatisfaction with the Union, the Board should uphold the Regional Director's decision to direct an election.

A. Certification Holds More Advantages Than Mere Voluntary Recognition, Including a Maximum Twelve-Month Bar to Elections.

A voluntary recognition is fundamentally different from a "solemn" secret-ballot election conducted under the Board's "laboratory conditions." *Brooks v. NLRB*, 348 U.S. 96, 99 (1954); *General Shoe Corp*., 77 NLRB 124, 127 (1948). A Board election and the Board certification that follows occupy a special place under the NLRA:

> There is no doubt but that an election . . . conducted secretly . . . after the employees have had the opportunity for thoughtful consideration, provides a more reliable basis for determining employee sentiment than an informal card designation procedure where group pressures may induce an otherwise recalcitrant employee to go along with his fellow workers.

NLRB v. Cayuga Crushed Stone, 474 F.2d 1380, 1383 (2d Cir. 1973).

That is why "secret elections are generally the most satisfactory–indeed the preferred–method of ascertaining whether a union has majority support." *NLRB v. Gissel Packing Co*., 395 U.S. 575, 602 (1969). Recognizing the importance of the secret ballot and the formal Board certification that follows, Congress mandated a one-year election bar following such certifications. *See* § 9(c)(3) of the NLRA, 29 U.S.C § 159(c)(3). Absent unusual circumstances,

the certification year rule both prohibits the employer from withdrawing recognition and bars employees from filing election petitions for a one-year period, irrespective of loss of majority status.

Because voluntary recognition is a less reliable method of determining employee sentiment than the secret-ballot, the Board has historically given it fewer protections. *Lamons Gasket*, at slip op. 6 (noting voluntary recognition carries fewer "attendant legal advantages"). After voluntary recognition, a union is only given a "reasonable period" to shield itself against a representation challenge. *See Lee Lumber & Bldg*. *Material Corp*., 334 NLRB 399 (2001); *Keller Plastics E*., *Inc*., 154 NLRB 583 (1966). Recently, the Board defined the reasonable period as at least six months after the parties begin bargaining for a contract. *Lamons Gasket*, 357 NLRB at slip op. 10. However, the Board also noted an "election remains the only way for a union to obtain Board certification and its attendant benefits." *Id*.

Given that an election is the gold standard for determining employee sentiment, the recognition bar cannot exceed the one-year certification bar. Here, more than one year has passed since the Union was voluntarily recognized, thus the Regional Director's decision to order an election is correct and well-reasoned.

B. Overturning the Regional Director's Decision Elevates Voluntary Recognition Above Certification.

To dismiss this petition would raise the voluntary recognition bar above the certification bar. This result is untenable. *Lamons Gasket* states: "[a]n election remains the only way for a union to obtain Board certification and its attendant benefits. Neither the pre-*Dana* law nor the law after today equates the processes of voluntary recognition and certification following a Board-supervised election." *Id*. at slip op. 14. The footnote accompanying this passage further clarifies that one of the attendant advantages to certification is a twelve-month bar. *Id*. at slip

op.14, n.35 ("Such benefits include a 12-month bar to election petitions under Sec. 9(c)(3) as well as to withdrawal of recognition . . .").

The Union argues that *Lamons Gasket* is ambiguous as to when the bar ends. Out of necessity, however, this Board must measure the length of the voluntary recognition bar from the date of recognition, lest it do exactly what *Lamons Gasket* claimed it was not: raising the recognition bar above the certification bar.

The Union itself recognizes this point, when it states in its brief: "clearly the Board did not intend in *Lamons Gasket* to confer greater protection to voluntary recognition than Board certification." Union-Intervenor Request for Review at p.9. Yet, this is exactly what the Union seeks here.

A hypothetical demonstrates the fallacy of the Union's reasoning. Should Ms. Cox have filed her petition only a few weeks after voluntary recognition, the Union would have claimed that the voluntary recognition bar automatically blocked the election, as the parties had not yet begun to bargain. When Ms. Cox filed her first petition on November 19, 2012, the Union claimed an automatic block, as the parties had just begun to bargain (after a nearly four month delay, entirely attributable to the Union). Thus, the voluntary recognition bar provided a nearly ten-month automatic bar in this case, blocking all petitions until April 9, 2013. Additionally, the Union could subject any petition filed before October 9, 2013 to a "reasonable time to bargain test," resulting in a recognition bar lasting nearly sixteen months post recognition. Such a bar provides much greater "attendant legal benefits" than a voluntary recognition, something *Lamons Gasket* expressly eschewed.

In a similar case, also involving the same Employer, Region 4 of the NLRB directed a secret-ballot election. In *Americold Logistics LLC*, 2012 NLRB Reg. Dir. Dec., Case No. 04-

RD-109029 (Aug. 23, 2013), the union was recognized in July 2012, but bargaining did not commence until December 2012. In directing an election, former Member Walsh noted:

> Where the start of bargaining is delayed, the possibility exists for a recognition bar which could extend well beyond a year following recognition and which would effectively grant a voluntarily recognized union greater rights than it would have achieved though Board certification. *This would, in my view, be an anomalous result*.

Id. at *8 (emphasis added).[4]

Moreover, the Board permits unions, after a voluntary recognition, to petition for an election in order to obtain certification, with its attendant statutory advantages. *Lamons Gasket*, 357 NLRB at slip op. 3 n. 6. Why would a recognized union contemplate petitioning for the "advantage" of a year long certification bar if voluntary recognition gave the union even greater time to shield itself from a representation challenge?

Additionally, the Union conflates the obligation to bargain with whether or not a recognition bar exists. Union-Intervenor Request for Review at pp.11-12. The Regional Director's decision ordering an election has nothing to do with whether or not there remains an obligation to bargain. An obligation for the employer to bargain with the incumbent union remains intact until recognition is either withdrawn when the employer has evidence that a majority of employees no longer support the union (which is not the case here), or until it is ousted by a majority of employees in a secret-ballot election (which the Union is attempting to prevent). The fact that no bar can exist after one year, absent any unfair labor practices on the part of the employer, has no effect on a continuing obligation to bargain.

Lastly, the Board has drawn parallels in the past between what constitutes a reasonable time to bargain and the certification bar, demonstrating the recognition bar cannot outlast the

[4] While Regional Director Walsh reached the correct result, and recognized the incongruity of the recognition bar running longer than the certification bar, Petitioner notes he incorrectly applied the *Lee Lumber* reasonable time to bargain test. As discussed, such a test is unnecessary because no bar can exist.

certification bar. The Board noted, in determining whether a union had been given a reasonable time to bargain, "our experience with the 1-year insulated period for newly certified unions convinces us that 1 year is sufficient to enable unions to demonstrate their effectiveness in negotiations." *Lee Lumber*, 334 NLRB at 402. If one calendar year is sufficient for certified unions, why should voluntarily recognized unions receive more time to protect themselves from a representation challenge? Limiting a voluntary recognition bar to one year creates certainty for employers, unions, and employees, while fulfilling congressional and Board intent.

C. The Regional Director Properly Ordered an Election Because the Board Encourages Parties to Begin Bargaining Immediately After Voluntary Recognition—Something the Union Did Not Do Here.

One of the Board's stated purposes in *Lamons Gasket* was to encourage employers and unions to come to the table and begin bargaining *immediately* after recognition. To truly understand *Lamons Gasket*, it is helpful to consider the case the Board was overruling. In *Dana Corp*., 351 NLRB 434 (2007), the Board modified the voluntary recognition bar in order to more finely balance free choice and stability in bargaining relationships. *Lamons Gasket*, 357 NLRB at slip op. 13. *Dana's* balance allowed employees a 45-day "window period" after voluntary recognition during which they could file a decertification petition supported by a 30-percent showing of interest. In order to start the running of the 45-day window period after voluntary recognition, an employer had to post an official Board notice informing employees of their right to seek an election. 357 NLRB at slip op. 1. The Board subsequently reversed course in *Lamons Gasket* and overruled *Dana*, largely because it surmised such a 45-day open period would cause at least a two-month delay in starting negotiations. *Id*. at slip op. 13. The Board was uniquely concerned about bargaining delays immediately following voluntary recognition:

> Yet *Dana* virtually guarantees such a delay in serious bargaining and the resulting undermining of the "nascent relationship between the employer and the lawfully recognized union." *Smith's Food*, supra, 320 NLRB at 845-846. The lengthy period of uncertainty created by *Dana* thus unnecessarily interferes with the bargaining process, rendering successful collective bargaining less likely.

Id. Additionally, the Board noted these post-voluntary recognition delays would undermine employee free choice, as employees who support the union want "meaningful representation as soon as practicable," not 60 days later. *Id*. It is an odd result to overrule *Dana* on the basis that a possible 60 day delay in bargaining brought about by employees exercising their free choice under the act undermines representation, while allowing the union to undermine employee free choice by its own failure to promptly begin bargaining.

The context of *Lamons Gasket* elucidates the only reasonable conclusion here: the voluntary recognition bar cannot extend more than one year post-recognition. To extend the bar past one year gives cover to unions who refuse, for whatever reason, to come to the table immediately after an election, thereby undermining the Board's stated policy of requiring parties come to the negotiating table promptly after recognition. Such a result rewards a union for its own failure to carry out its fiduciary obligations on behalf of employees, and is incompatible with Congress' intent in Section 9.

The type of post-recognition delay the Board was attempting to prevent in *Dana* was caused by the Union here. The Union was so disorganized post-recognition that it needed two meetings to elect officers and committeemen. Furthermore, the Union's Agent admitted that the Union was not ready to begin bargaining until "mid-September." This nearly four-month delay in coming to the bargaining table not only extended the Union's ability to block any election sought by Ms. Cox and other employees, but undermined the central purpose of *Lamons Gasket*,

which is that employees want "meaningful representation as soon as practicable." 357 NLRB at slip op. 13.

To employ the Union's own reasoning, *Dana* was correctly decided. If the Union was not prepared to begin bargaining for almost four months post-recognition, this would have been enough time under *Dana* for the Employer to post a notice and for employees to exercise their free choice by petitioning for a secret-ballot election. With no bargaining, and a Union that admittedly was unprepared to bargain after recognition, the process announced in *Dana* could not have "undermined the nascent relationship" between the parties. *Id*. An employer cannot refuse to meet when the union is unprepared, and the process in *Dana* would not have contributed to any delays. Ms. Cox and her fellow petitioners could have exercised their free choice for a secret ballot while the Union continued to shelter itself in preparation for bargaining. As the allegation of post-recognition delays contributed to the death of *Dana*, it should likewise not prejudice Ms. Cox's petition.

D. The Board Has Sufficient Remedies to Deal with Employers Who May Refuse to Bargain.

Lastly, if an employer causes a delay by refusing to bargain, a union already has a remedy available to extend the recognition bar—a NLRA Section 8(a)(5) unfair labor practice charge. An employer's unfair labor practice has always been the only "unusual circumstance" extending the length of an election bar. *See Mar-Jac Poultry Co*., 136 NLRB 785, 786 (1962).

Here, the Union hinges its request for review on the theory that if it looks like an unfair labor practice, and it quacks like an unfair labor practice, it is immaterial whether there was no unfair labor practice charge filed or violation found. If the Union honestly believed the Employer was dawdling in order to avoid bargaining, it should have brought a Section 8(a)(5)

charge in order to force the Employer to the table. The Union did not do so.[5] Now, once its representation is challenged by employees more than one year after recognition, the Union is asking the Region to extend the recognition bar past one year, a remedy that is only warranted if the Union had brought a meritorious charge during the Section 10(b) statute of limitations period. In effect, the Union argues the Region and the Board should find a presumption of guilt against the Employer based on the contents of a prior representation hearing. A representation hearing is not, and has never been, the proper venue for adjudicating employer and union disputes concerning delays in bargaining, or any other unfair labor practice charges. Without such charges motivating employees' dissatisfaction, to extend the recognition bar results only in harming employees who want to exercise their free choice under the Act. *Peoples Gas Sys., Inc.* v. *NLRB*, 629 F.2d 35, 45 (D.C. Cir. 1980) ("One of the fundamental rights under the Act which the board is charged with protecting is employees' right to choose their bargaining representative, as well as the 'right to refrain' from collective bargaining.").

Moreover, the cases the Union cites support this point. Never has the Board extended an election bar more than one year without an employer committing an unfair labor practice. *See, e.g., Badlands Golf Course,* 355 NLRB No. 42 (June 10, 2010) (bargaining extended after employer violated Sections 8(a)(1) and (5) of the Act); *AT Sys., W., Inc.*, 341 NLRB 57 (2004) (bargaining extended after employer violated Sections 8(a)(1), (2), and (5) of the Act); *Erie Brush & Mfg. Corp.*, 357 NLRB No. 46 (August 9, 2011) (certification year extended after Employer violated Section 8(a)(1) and (5) of the Act), *vacated*, 700 F.3d 17 (D.C. Cir. 2012) (finding no unfair labor practice had occurred). Furthermore, the Union's reliance on *MGM*

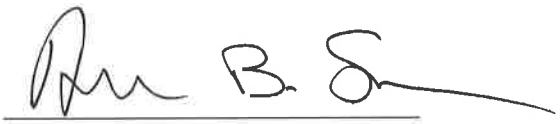
[5] Ms. Cox was the only party to file unfair labor practice charges in this petition. She filed charges against the *Employer*, because the Employer illegally refused to allow her to collect signatures for her decertification effort in a company break area, in the company parking lot, during non-work time. NLRB Nos. 25-CA-094901, 25-CA-099346. A complaint was issued against the Employer and the parties entered into a private settlement agreement allowing full Section 7 activity to occur on the property.

Grand Hotel, Inc., 329 NLRB 464 (1999) is misplaced. In *MGM*, the Board did not address the question of whether or not the recognition bar could extend past one calendar year. There the third decertification petition was filed nine days before the one year anniversary of the voluntary recognition. *Id*. Given that one year had not yet passed, application of the "reasonable time to bargain" test was appropriate.

Lastly, the Union wants the Board to gaze into a crystal ball and find itself prejudiced because the Employer and the Union *may* have been able to agree on a contract before June 26, 2013. This is nonsensical. There is no way to prove that had the parties actually met between May 22 and June 25, 2013 they would have actually come to an agreement. Only after the Employer made its "last, best, and final" offer in June did the Union decide to capitulate and enter into a tentative agreement.

CONCLUSION

With the free choice of the employees at stake, the Union failed to meet its burden of proving the recognition bar should be extended. Nor can it, because such a result would violate the rules and policies laid down in *Lamons Gasket*, as well as Congress' policies set forth in Section 9 of the Act. As more than one year has passed, a bar can no longer exist to block Ms. Cox's election. For these reasons, the Board either should dismiss the Union's Petition for Review, or grant it and summarily approve the Regional Director's direction of election.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document, described as the Petitioner's Opposition to the Intervenor's Request for Review, was served on the parties via e-mail to:

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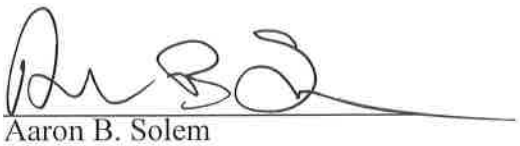

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